

Legal Analysis Of Unregistered Marriage According To Civil Rights An Indonesian

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Abstract

This study examines the legal analysis of marriage isbat according to the Civil Code, Law Number 1 of 1974 concerning Marriage and the Indonesian KHI. Based on the results of the study, it was found that marriage isbat is regulated in the Civil Code Articles 100-102. Regarding marriage isbat, the Civil Code does not provide strict limits on the elements that can be considered by the judge in determining the validity of a marriage. However, it has weaknesses, namely the disparity between the Indigenous, foreign and Chinese residents, this is what causes the absence of unification of a regulation and is the background for the birth of Law Number 1 of 1974 concerning Marriage. Law Number 1 of 1974 concerning Marriage also does not provide limitations regarding marriage events that can be requested for ratification. In contrast to the two provisions, the Compilation of Islamic Law (KHI) regulates the isbat of marriage in a strict manner by providing limitations as described in Article 7 paragraphs (1) to (4) in which a marriage can only be proven by a Marriage Certificate. A marriage cannot be proven by a marriage certificate, its marriage certificate can be submitted to the Religious Court/Syar'iyah Court. The marriage isbat submitted is limited to five things and those who are entitled to apply for itsbat marriage are husband or wife, their children, marriage guardians and parties with an interest in the marriage.

Keywords: *Isbat of marriage, Civil Code, Compilation of Islamic Law*

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I. Introduction

Marriage is a very important thing in the realities of human life. Marriage builds up in harmony with religious norms and social order. The purpose of marriage is to build a perfect family, *sakinah, mawaddah, warahmah*, for that, a husband and a wife need roles to complement each other in order to achieve spiritual and material well-being. Still, there will be problems, such as Siri's marriage (betel marriage), divorce, and so on. Therefore, in anticipation of all future problems, the marriage needs to be recorded.¹

One of the problems with society is the proliferation of marriage under the hands or the more commonly known as Nikah Siri or betel marriage. Betel marriage can be defined as a legal marriage alliance by conforming to the marriage material, but by not keeping the formal legal requirements so as to be off the record and obtain a marriage certificate because it is performed outside the supervisory of the registrant (PPN).² Siri's Marriage (betel marriage) was illegal because it failed to register her marriage before the marriage registrar and the office of Religious Affairs (KUA), being performed only according to religious law or custom, was not publicly announced nor formally recorded.³ The widespread nature of Siri's marriage is due to a lack of public understanding of the rules. There are still many societies where the recording of marriage is not a valid requirement for marriage, it is valid when it is performed according to one's religion and beliefs.⁴

An approved and marriage harmony is viewed as valid in the eyes of religion and public belief. Legally, however, marriages are valid in the eyes of religious and religious beliefs.

¹ Imam Rofiqi, Ikarini Dani Widiyanti dan Nuzulia Kumalasari, "Analisis Yuridis Permohonan Isbat Nikah oleh Istri yang Suaminya Telah Meninggal Dunia", *Jurnal Jendela Hukum*, 24.

² Meita Djohan Oe, "Isbat Nikah dalam Hukum Islam dan Perundang-undangan di Indonesia", *Pranata Hukum*, vol. 8, no. 2 Juli 2013, 138.

³ Nuruddin dan Azhari Akmal Tarigan, *Hukum Perdata Islam di Indonesia* (Jakarta: Prenada Media, 2004), 124.

⁴ Agustin Hanapi, Mulyadi, Mursyid Djawas, "Isbat Nikah Siri dalam Putusan Mahkamah Syar'iyah Lhoksukon", *Media Syari'ah: Wahana Kajian Hukum Islam dan Pranata Sosial*, vol. 23, no. 1, 2021, 73.

Certainly it needs to be re-enacted by the state as stated in chapter 2 of the verse (2) the marriage act that should be recorded according to legislation. If the marriage is not carried out according to the current marriage law (1) and (2) the marriage act, then this condition cannot provide a legal certainty for the husband, his wife and children because it is not recognized as a positive law in the country of Indonesia.⁵

An unregistered marriage will cause some problems with the law: marriage is illegitimate according to a positive law; the children born from siri's marriage (betel marriage) have only civil relations with her mother and her family; his wife and children are not entitled to a living and an inheritance; and the husband cannot claim his claim on the property as long as they are bound in the marriage of siri.⁶ In this regard the most affected were the children born from siri's wedding, the children having no idea what was going on, but it was the child's day that had the most difficulty.

There are several factors that cause one to omit the marriage at the registry is due to the cost not being able to pay for administration but the marriage is not a secret, fear of being caught violating the rule that forbids civil servants to marry more than one, is not old enough to perform domestic marriages, and marriages that are kept secret from consideration.⁷

Given the above phenomenon, the marriage record is the extraction that very important to do. Basically, a marriage record is to create order related to administrative states that it is expected to bring about social order in the public. Thus, wedding events in Indonesia can be controlled, had strength and protection of the law and no party was harmed especially the wife. On the other hand, the Indonesian jurisprudence of Islamic law does not place existing legislation as contrary to Islamic law.⁸

⁵ Imam Rofiqi, Ikarini Dani Widiyanti dan Nuzulia Kumalasari, "Analisis Yuridis Permohonan Isbat Nikah oleh Istri yang Suaminya Telah Meninggal Dunia", 24.

⁶ Feri Kurniawan dan Abd. Qohar, "Analisis Putusan Hakim Tentang Isbat Contencius pada Pengadilan Agama Gunung Sugih", *Al-Manhaj: Jurnal Hukum dan Pranata Sosial Islam*, vol.3, no. 1, Juni 2021, 68.

⁷ Gema Mahardhika Dwiasa, Sosyan Hasan, dan Achmad Syarifudin, "Fungsi Itsbat Nikah Terhadap Isteri yang Dinikahi Secara Tidak Tercatat (Nikah Siri) Apabila Terjadi Perceraian", *Jurnal Ilmiah Hukum Kenotariatan*, vol. 7, no. 1 Mei 2018,

A married person is credited with getting a marriage certificate as an authentic proof of a marriage and is sorely needed to arrange for a child's birth certificate, identity card, return to school, apply for a job, divorce, retirement, etc.⁹ whereas a marriage that is performed in siri/betel is bound to be lacking a marriage certificate. Siri's own marriage took place under 1974 before the birth of the marriage act and after 1974. Siri's marriage prior to the valid 1974 statute number 1 was a natural and solution to the rite of marriage.¹⁰ Marriage Isbat is the legalization of marriages that have been performed under Islamic law, but it is not recorded by the authorized registrations (KUA) and PPN. In the other words, marriage isbat is an attempt to legalize a marriage by appointing a judge at a religious trial.¹¹

Marital issues are the absolute authority of the Religious Court / Shi'iyah Council. The marriage certificate can be performed only by couples who marry before the valid act of 1974 or after the bill is passed under the marital stipulation of a settlement of a divorce, any doubts as to the legality of marriage and the loss of a marriage certificate. Marriage vows can only be asked limited to the issues associated with a marriage in settlement of a divorce, the loss of a marriage certificate, there are doubts as to whether or not one of the marital requirements exists.

⁸ Agus Muchsin, Rukiah dan Muhammad Sabir, "Legalisasi Perkawinan yang Tidak Tercatat pada Masyarakat Pinrang (Analisis Perma No 1 Tahun 2015 Tentang Pelayanan Terpadu Pencatatan Nikah)", *DIKTUM: Jurnal Syariah dan Hukum*, vol. 17, no. 1 Juli 2019, 32.

⁹ Siska Lis Sulistiani, "Analisis Yuridis Aturan Isbat Nikah dalam Mengatasi Permasalahan Perkawinan Sirri di Indonesia," *Tahkim Jurnal Peradaban dan Hukum Islam*, vol. 1, no. 2 Oktober 2018, 42.

¹⁰ Meita Djohan Oe, "Isbat Nikah dalam Hukum Islam dan Perundang-undangan di Indonesia", 138.

¹¹ Riswan Munthe dan Sri Hidayani, "Kajian Yuridis Permohonan Itsbat Nikah pada Pengadilan Agama Medan," *Jurnal Pendidikan Ilmu-Ilmu Sosial*, vol. 9, no. 2 Desember 2017, 12

There are marriages that took place before the 1974 rules on marriages and marriages performed by the No. 1 act of 1974., therefore the solution to the problem was made by filling a marriage petitions to the religious courts where we live.

Marriage issues are viewed as a vital to nation and national life of Indonesia. From the declaration of independence to the present day, governments take a very serious interest in marriage. This is demonstrated by the many regulations of legislation made to regulate marriage.¹³ marriage laws enacted throughout Indonesia as stated in the registry section 100 – 102, laws No. 1 in 1974 about marriages. Laws No. 16 in 2019 on a change to the 1974 act No.1 or what is commonly referred to law of the marriages. The marriage law was formally juridical and included in Indonesia's positive laws. The marriage law contains the nature or basis of marriage, as well as the basic principles and legal basis for holding on to all levels of society in the country of Indonesia. Nevertheless, for Muslim citizens beyond marital law, the issues of the marriage is also set up in a compilation of Islamic law (KHI).¹⁴ Hence, the author is interested in Reviewing the Legal Analysis of Marriage According to Civil Rights and Indonesian KHI.

II. Methods Of The Research

The method used in this study was normative juridical. Normative juridical research is a study of the law of literature conducted by examining the literature materials of laws, regulations, and books as secondary data. Data analysis is one descriptively by studying and analyzing how the position and legal rules of marriage are based on civil and Islamic law compilations (KHI)

III. Discussion

1. The Notion of Marriage

The euphemism comes from the two syllables of Arabic letter for marriage. Etymology is the root of the word *asbata-yasbitu-isbatan* meaning determination or establishment.¹⁵ Marriage comes from a *nakaha* that means mutual or getting married. By definition *Isbat nikah* is the institution of marriage.¹⁶ as terminology, *Isbat Nikah* is the confirmation and establishment of marriage by recording in an effort to obtain the legalizing of a marriage.¹⁷

¹² Agustin Hanapi, Mulyadi, Mursyid Djawas, "Isbat Nikah Siri dalam Putusan Mahkamah Syar'iyah Lhoksukon". 73-74.

¹³ Andi Nadir Mudar, "Fenomena Itsbat Nikah Terhadap Perkawinan yang Dilakukan Setelah Terbitnya Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan (Studi di Pengadilan Agama Andolo)", *Zawiyah Jurnal Pemikiran Islam*, vol. 4, no. 2 Desember 2018, 110.

¹⁴ Hanif Fauzi, "Isbat Nikah Pasangan di Bawah Umur di Pengadilan Agama Purwakarta", *As-Syariah*, vol. 23, no. 1 Juni 2021, 145.

¹⁵ Meita Djohan Oe, "Isbat Nikah dalam Hukum Islam dan Perundang-undangan di Indonesia", 139.

Isbat Nikah was, according to the decision of the Chairman of Supreme Court of Indonesia No. KMA/032/SK/2006 as to guidelines for performing duties and judicial administration, the legalization of marriages held according to the Islamic *syari'at*, but was not recorded by the authorized of local religious affairs office (KUA) or PPN. *Isbat nikah* consisted of a method or way in determining the legality of a marriage that had not been registered in the local congregation, according to the legal requirements that would apply to the judicial matter of marriage. In the technical manual of the judicial administration of religion it is explained that marriage is a statement of the legality of marriage performed by religion and is not recorded by the authorized PPN.¹⁸

Isbat nikah or marriage is a result of the religious court/court of *shar'iyah*, referred to term of *jurisdiktiovoluntair* (not a real court), because there are only applicants in this case, but there are no issues in it, so there is no opposition.¹⁹ Thus, it can be concluded that *isbat nikah* or marriage are the only means by which legally married couples according to the religion of *shar'iyah* will have a legal claim or legality to make it meets to the criteria for *Isbat* based on the applicable laws and regulations.

¹⁶ Feri Kurniawan dan Abd. Qohar, "Analisis Putusan Hakim Tentang Isbat Contencius pada Pengadilan Agama Gunung Sugih", 71.

¹⁷ Zaidah Husna, "Isbat Nikah dalam Perspektif Kompilasi Hukum Islam Hubungannya dengan Kewenangan Peradilan Agama", *Syariah: Jurnal Hukum dan Pemikiran*, Desember 2017, 71.

¹⁸ Mahkamah Agung, Pedoman Teknis Administrasi dan Teknis Peradilan Agama (Buku II) (Jakarta: Mahkamah Agung, 2010), 147.

¹⁹ Andi Nadir Mudar, "Fenomena Isbat Nikah Terhadap Perkawinan yang Dilakukan Setelah Terbitnya Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan (Studi di Pengadilan

2. The Basic Law of Marriage (Isbat Nikah)

Associated with marriage registering in Islam itself, there are no explicit rules either in the Qur'an or the Hadits.

²⁰ In the time of the Prophet Muhamma SAW and friends, where there is no known record of marriage. At that time, marriage was valid when it has fulfilled the conditions and pillars of the marriage. Today, wedding keeping is based on two reasons:²¹

a. Qiyas

Efforts to equate things with predetermined objects in the Qur'an, hadits and the agreement of friends. It is as calculated in your record that you were ordered to do noted under certain conditions. The word of Allah SWT:

"to all the human of faith, if you call yourselves and empty person for the appointed time, let you write it down." (Q.S. Al- Baqarah: 282)

When it linked to the concept or recording a marriage, the verse has two meanings:

1. If loans or other services should be listed, such as sacred marriage functions should be more important to record.

2. Marriage is not a common problem, but covenant that very powerful as described in word of Allah SWT:

"how will you take it back, when some of you have mingled (mixed) with the others as wives and they (your wives) have taken from you a strong covenant."

(Q.S.An-Nisa': 21)

²⁰ Asrinawati Oktavia Siregar, "Efektivitas Pelaksanaan Isbat Nikah oleh Pengadilan Agama Lubuk Pakam (Berdasarkan Peraturan Mahkamah Agung Nomor 1 Tahun 2015)", *Tesis*, Sumatera Utara: UIN Sumatera Utara, 2019, 30.

²¹ Imam Rofiqi, Ikarini Dani Widiyanti dan Nuzulia Kumalasari, "Analisis Yuridis Permohonan Isbat Nikah oleh Istri yang Suaminya Telah Meninggal Dunia", 26

b. Maslahah Mursalah

Micro finance institution is not a problem of poverty. In this case, marriage is viewed as a much needed institution of society. Moreover, it would also promote peerage if no record was taken. Any eventually should be avoided as a the fiqh code of the book of fiqh states *ضلال زورال*, which calls for unusual measures of measurements, meaning that youth must be removed.

In Indonesia's positive laws, Isbat nikah (marriage) is regulated in code of civil law (KUHP) Chapter 100-102, the 1974 no.1 rule came into effect since October 1, 1975, with the 1975 government rule no.9 of April 1, 1975, as well as a compilation of Islamic law (KHI). Originally, marriage (Isbat nikah) authority was placed on those who performed siri's marriage before the 1974 Jo act number 1. The commission, in turn, was enlarged by a compilation of Islamic law (KHI) chapter 7 verse (2) and (3).²²

3. Purpose of the Marriage (Isbat Nikah)

As it stated in the valid legislation and article 7 of the compilation of Islamic Law on marriage can only be prove bt marriage certificate. It means that when it comes to marriage without a marriage certificate, a solution is possible to obtain a marriage proposal. The purpose or the marriage has an authentic proof of a marriage certificate quotation and a legalization of both formally and in a wider community. In addition, to avoid the backbitting at any time occurs in the everyday society in which directly affects to the women. Therefore, marriage vows that become the legal authority of religious justice/court are a wise solution to address the matter in the community, as we know that one legal function of governing provides protection for the rights of the community. The practice of marriage and record keeping serves to establish order that implicates the rights of the couple that get it married.²³

22 Asrinawati Oktavia Siregar, “Efektivitas Pelaksanaan Isbat Nikah oleh Pengadilan Agama Lubuk Pakam (Berdasarkan Peraturan Mahkamah Agung Nomor 1 Tahun 2015)”,

4. Marital Conditions/Requirements

The term of matrimony as explained in the compilation of Islamic law chapter 7 verse (3) includes: ²⁴

- a. There is a marriage in the process of a divorce
- b. Loss of marriage certificate
- c. There are doubts about whether or not one of the marital conditions or requirements is valid.
- d. Any marriage that occurred before the 1974 statute number 1.
- e. Marriages made by those who didn't have a hitch in marriage by 1974's act number 1.

On the other hand, the marriage terms are analogous to marriage requirements: ²⁵

- a. The male requirements of religion, male, person of obvious character can be unanimous and has no marriage impediment.
- b. The women's terms of religious, female, self-evident, can be asked for and have no marriage inhibitions.
- c. Legal guardian requirement is male, baligh, guardianship, the trust is not obstructed
- d. The witness requirements, which is a minimum of two people, was present of Ijab Qabul, understanding of laws, religious, and baligh (puberty)
- e. Ijab Qabul (islamic marriage contract)

23 Satria Efendi M. Zein, *Problematika Hukum Keluarga Islam Kontemporer* (Jakarta: Prenada Media, 2004), 86.

24 Kompilasi Hukum Islam Bab II Pasal 7 ayat (3)

25 Asrinawati Oktavia Siregar, “Efektivitas Pelaksanaan Isbat Nikah oleh Pengadilan Agama Lubuk Pakam (Berdasarkan Peraturan Mahkamah Agung Nomor 1 Tahun 2015)”, 28

Based on the term above, it may be concluded that not all events can be converted by a religious court. The marriage petition filed after the trial and its jurisdictional conditions have been met will grant the request. On the other hand, if his terms are not met, then the judge will reject the request. However, if the requirements are not met, request may be granted, with the exception that the court of judges has sound arguments in its judgement such as psychological, sociological, or other considerations that if not granted will result in a measure of good reage for many. For example, to be denied a marriage petition would make it difficult for a child to obtain a birth certificate and so on. ²⁶

5. The Application of Marriage Pleadings

The applications for marriage (isbat nikah) can be done in the following two ways: ²⁷

1. Application for marriage license voluntair)
Application for legalization submitted to the religious court/the Supreme of Shar'iyah is product its confirmation. Voluptuse endorsement if a couple whose marriage is not registered equally want it recorded in KHU who first petitioning marriage to the religious court of law/shar'iyah, where they are appointed petitioners one and two.
2. File a marriage legalization/application(*contensius*)

Application for legalization submitted to the religious/shar'iyah court for a ruling. If there is legal interest with the other side, then marriage legitimization must be brought in the form of a marriage certificate, such as a child, an important marriage guardian and one of the husband or wife's parties of the marriage vows have passe away.

26 Meita Djohan Oe, “Isbat Nikah dalam Hukum Islam dan Perundang-undangan di Indonesia”, 140.

27 Gema Mahardhika Dwiasa, Sofyan Hasan, dan Achmad Syarifudin, “Fungsi Isbat Nikah Terhadap Isteri yang Dinikahi Secara Tidak Tercatat (Nikah Siri) Apabila Terjadi Perceraian”, 25.

6. The civil analysis of Married law

Evidence of a marriage is arranged in the civil law code section 100-102 as read as follow :²⁸

a. Article100

the existence of a marriage cannot be proved in any other way than the certificate of marriage that is registered in registry lists, except in the things set out in the following chapters.

b. Article101

if it turns out that these lists never existed, or have been lost, or the marriage certificate is not present, then the judging of the sufficient evidence of marriage is passed on to the judge, as long as it is evident that the married relationship exists.

c. Article102

The rightness of a child who could not show his or her deceased parents' marriage certificate, indisputable, when he has shown his position as a child according to his birth certificate, and his parents had obviously lived as wives.

In the practice of even post-liberty dating, a person who claims to be married still has no authentic proof of marriage in the form of a marriage certificate, aside from a lack of legal awareness in society, is equally an important factor in the lack of uniform rules on marriage as found in the civil law (KUHPerdata)

As a legal product of the Indian Dutch government heritage, the civil law (KUHPerdata) had a certain weakness, including the legitimacy of the marriage. This is what led to the birth of the 1974 statute no.1 about marriage as amended to act 16 in 2019 on the reversal of 1974's no.1 on marriage. Among the disparity of the civil law (KUHPerdata) of marriage is that of the disparity between indigenous people, the foreign east and the Chinese, these are what caused the lack of presence unification of a rule. So the potential is not met under act number 100 above getting higher.

²⁸KUHPerdataBagian7 Pasal100-102

However, when it comes to marriage/Isbat nikah (attestation), the civil law (KUHPerdata) give one point of light that an admission of the legality of an unregistered or validated marriage cannot show the proof of a transpo, so the valid assessment of a marriage is submitted according to the judge's judgement.²⁹

In the article 19 of act number 48 of 2009 on the power of justice, it mentions that the judge is a state official who exercises the judiciary powers governed by the law. In the context of marriage within the law, the bestowal of authority on the judge's legal assessment of a marriage is the use of attribution instruments. Ridwan HR, explaining that authority that is directly obtained is genuine is derived from legislation. In other words, the organ of government draws direct authority from certain editors of the regulations of legislation. When it comes to attributing authority, a receiver can create new authority or expand existing authority.³⁰

the problem, however, the civil law (KUHPerdata) does not give a valid basis for the judge's consideration of the legality of marriage because as mentioned above the civil law (KUHPerdata) have not provided a union rule, not even a rule of marriage, according to race and class. Thus the judge would have to try to dig out the law even to find the law (*recht vinding*) so that the judge's legal assessment of a marriage was not based solely on a formative requirement in the civil code and merely on a sure and certain law but on the principle of expediency and acceptable socially justice.³¹

²⁹ *Ibid.*, KUH Perdata Pasal 102

³⁰ Ridawan HR, *Hukum Administrasi Negara* (Jakarta: Rajawali Pers, 2016).

³¹ Pasal 5 Undang-undang Nomor 48 tahun 2009 Tentang Kekuasaan Kehakiman

Therefore, the principle of *iuscuria novit* (judge supposed to understand all kinds of law) is binding upon the judge as the beneficiary of the arbitrariness of marriage which the judge as a single interpreter of the legal profession of marriage. It is consistent with the principle that the judge should not reject the case, it is quite another in criminal cases where the legality of the *Nullum delictum nullapoenasinepraevialege poenalli* (no criminal without a rule first).

7. Marriage Law Analysis According to the 1974 Law on Marriage

The birth of the marriage act number act number 1 in 1974, and the old regulation of marriage enacted in the civil ceremony is no longer enforced in accordance with the legal principle of *Lex posterior derogat legi priori*, which also states in the chapter 66 reads: “ For marriage and everything connected with marriage under this law, it is in effect the legislation governed by the civil law (*Burgerlijke Wetboek*), Christian marriage (*Huwelijks Ordonantie Christen Indosiaers*, S.1933 No.74)”, The rule of mixed marriage *Regeling op de gemengde Huwelijken* S.1898Nom.158) and other regulations governing marriage as far as it has been ruled are void.”³²

Under the 1974 act of marriage, article 2 states:³³

- (1) Marriage is valid/legal when the laws of each one’s religion and belief are valid.
- (2) For each marriage is recorded according to regulations that enforce it.

³² Undang-Undang Republik Indonesia Nomor 1 Tahun 1974 tentang Perkawinan. (Lembaran Negara Republik Indonesia Tahun 1974 Nomor I. tambahan Lembaran Negara Nomor 3019) Pasal 66.

³³ UU Nomor 1 Tahun 1974 tentang Perkawinan Bab I Pasal 2

From chapter 2 above legal experts differ in understanding the legitimacy of marriage, some consider that article 2 verse (1)and(2) to be cumulative prerequisite for the legality of a marriage, while others view the verse (1)and(2) as such to make a marriage legal s long as it has been performed under the chapter (1) while the chapter (2) only as a condition of administration for authentic proof of its administration of marriage. Both views are, with legal implications in society and a contributing factor in an untapped marriage. And so did the settlement of the marriage petition in the court.

Marriage is the birth/human right of each citizen as stated in the constitution of the republic of Indonesia chapter 28 b (2) that states: “everyone has the right to form and carry on the offspring through a lawful marriage.”³⁴ A careful consideration of the wording of a legal marriage in that chapter implies a requirement that must be met before administering the marriage. Since marriage is an important legal event, it requires written evidence of a marriage registry that is followed up with the release of a marriage certificate by marriage officer (PPN) as authentic evidence.

In the 1974 clause 2 verse (1) marriage is said to be a legal marriage if carried out by religious law. Then in the chapter 2 verse (2) states that each marriage is recorded according to the applicable regulations of the law. Such as provision would result in a marriage certificate that would provide legal proof of marriage. The marriage certificate did much good for the married person in the future when there were problems and mobility is beneficial for children on the silver lining.³⁵

³⁴ Undang-Undang Dasar Negara Republik Indonesia Tahun 1945.

³⁵ Faizah Bafadhal, “Itsbat Nikah dan Implikasinya Terhadap Status Perkawinan Menurut Peraturan Perundang-Undangan Indonesia”, *Jurnal Ilmu Hukum*, Maret 2014, 4.

In line with civil law (KHUPerdata), the 1974 statute number 1 as amended with the 1974 act number 16 in 2019 of the change to the 1974 act number 1 also does not provide limitations on the marriage events that can be sought for validating. Even the 1974 statute number 1 and government rule of the 1975 act number 9 are not mentioned of unregistered marriage. Hence in article 47 jo. Section 48 of government rule number 9 of 1975 still gives the possibility of a valid/legal marriage rule as long as it is not governed by the number 1 of 1974 law and number 9 of 1975 government regulation.

8. Analysis of Marriage Laws According to the Compilation of Islamic Law

In contrast with the 1974 registry and the number 1 law of marriage, the compilation of Islamic law (KHI) regulates the rigor of marriage by restrictions as defined in chapter 7 verses 1),(2), (3),and(4) that reads:³⁶

- (1) Marriage is assested only by a marriage certificate which made by marriage registrar.
- (2) Marriage could not be proved by marriage certificate could be submitted to a religious court.
- (3) Marriage prospects that can be submitted to a religious court are limited in regard to:
 - (a) There is a marriage in the process of a divorce settlement;
 - (b) Loss of marriage certificate;
 - (c) There is a doubt as to whether a marriage is legal or not;

(d) A marriage occurred before the statute no 1 of 1974;

(e) Marriages made by those who have had no hindrance to marriage under the 1974 statute;

³⁶ Mahkamah Agung RI, *Himpunan Peraturan Perundang-Undangan yang Berkaitan dengan Kompilasi Hukum Islam serta Pengertian dalam Pembahasannya* (Jakarta: Mahkamah Agung RI, 2011), 65.

(4) The right to submit a marriage proposal is for the husband or wife, their children, the guardian of marriage and the proper mate.

A compilation of Islamic law (KHI) was formed based on the article 27 of act number 14 in 1970 about the power of justice were obliged to dig into and understand the legal values that were developing in society. While the functional basis of KHI is Indonesian fiqh which is regulated by considering the current conditions of the needs of Muslim in Indonesia. It means, not creating a new school of thought, but uniting various opinions of mazes of Islamic law to equalize the judge's perception of Islamic law toward legal certainty for Muslims.³⁷

Related to marriage, in the compilation of Islamic law is explained in chapter/article 3 that marriage aims is to create a *sakinah, mawaddah dan warahmah*. Legal marriages according to Islamic law (KHI) as mentioned in article 4 are marriages carried out according to Islamic law in accordance with article 2 paragraph (1) of the UUP. Means, KHI emphasizes marriage on the concept of Islamic law, but still based on Islamic law (UUP).

In the case of unregistered marriages or underhanded marriages that are only carried out according to Islamic religious law, but it cannot be proven by the existence of a marriage certificate. It is stated in article 7 paragraph (1) that marriage can only be proven by a marriage certificate made by a marriage registrar (PPN). In this case, the VAT has the authority to register marriages. Therefore, as stated in article 7 paragraph (2) KHI provides the opportunity to apply for a marriage certificate to the religious court/*syar'iyah* court to obtain a marriage certificate as authentic of a marriage

With the provisions stipulated in article 7 paragraph (2), it can be said that the legal force of marriage is the same as the legal force of the marriage certificate. Thus, the legal consequences arising from unregistered marriages which are later attributed will be the same as registered marriage at the time of the marriage.³⁸

At first, the authority of the unregistered marriage case was reserved for husband and wife who had an unregistered marriage before the enactment of law number 1 of 1974 concerning marriage law. And government regulation number 9 of 1975.³⁹ Later, this provision was expanded with the adoption of the provisions of the compilations of Islamic law article 7 paragraph (2) and (3). Meanwhile, unregistered marriages that occur after the birth of the UUP or after 1974, in this case the judge refers to the provisions of article 7 paragraph 3 letter (e) which generally apply to any unregistered marriages that occur on condition that it can be proven at trial that the marriage is unregistered. Has been carried out legally, has fulfilled the requirements pillars, there is no prohibition of marriage according to the law or religious law that is violated, then the judge has a legal basis to grant the request for *isbat*. On the other hand, if the marriage cannot be proven in court that the marriage has been carried out legally, does not meet the requirements pillars, there is a marriage prohibition according to law or religious law that is violated, then the application for *isbat* is rejected.⁴⁰

³⁷ Muchsin, *Masa Depan Hukum Islam di Indonesia* (Jakarta: BP IBLAM, 2004), 45-46.

³⁸ Gema Mahardhika Dwiasa, Sosyan Hasan, dan Achmad Syarifudin, "Fungsi *Isbat* Nikah Terhadap Isteri yang Dinikahi Secara Tidak Tercatat (Nikah Siri) Apabila Terjadi Perceraian", 22.

³⁹ *Ibid.*, 23.

⁴⁰ Meita Djohan Oe, "Isbat Nikah dalam Hukum Islam dan Perundang-undangan di Indonesia", 142.

In the case of *Isbat contensius* (Isbat marriage accompanied by lawsuit for divorce) because previously the marriage was not recorded by marriage registrar (PPN), referring to Article 7 paragraph (3) letter (a), then based on that article, the judge has a legal basis to ratify the marriage in the context of the divorce settlement. In the case of an *Isbat* application because the marriage certificate is lost, the judge refers to Article 7 paragraph (3) letter (b). If it is proven at the trial that the marriage has been legally and recorded, meets the requirements and in harmony, does not violate the marriage prohibition, then the judge has a legal basis to grant the request for *Isbat*. Application for marriage *Isbat* because of doubts from the applicant regarding the validity of the marriage conditions that have been done, then the judge refers to article 7 paragraph (3) letter (c). The panel of judges will ratify the marriage if it has complied with religious provisions, and there are no prohibitions or impediments to the marriage being violated. Applications for marriage *Isbat* for those who marry religiously without being recorded by the marriage registrar, then refer to article 7 paragraph (3) letter (d) the judge will

grant the requests as long as the marriage meets the pillars and conditions according to Islamic Shari'ah and there is certainty that there is no violation. Against the prohibition of marriage according to the UUP and KHI. Furthermore, in cases of unregistered marriages after the issuance of the UUP, the court will continue to process it in court and the judge will grant it if the pillars and conditions are met and refer to Article 7 paragraph (3) letter (e). This is because this article applies generally to both unregistered marriages occurring before 1974 as long as the pillars and conditions of marriage are fulfilled.⁴¹

⁴¹*Ibid.*, 142-143.

⁴²FaizahBafadhhal, "IsbatNikahdanImplikasinyaTerhadapStatusPerkawinanMenurut PeraturanPerundang-UndanganIndonesia", *JurnalIlmuHukum*, Maret2014, 13

Those who are entitled to apply for Isbat marriage as stated in article 7 paragraph 4 are husbands, wives, children, marriage guardians and parties with an interest in the marriage. The existence of isbat marriage has implication for marital status, where a marriage has legal force that gives rights to the wife and children born of the marriage. So, Isbat marriage as a legal basis for recording marriage will give birth to legal certainty both on marital status, children status, and jointly owned property in marriage.⁴²

IV. Conclusion

Article 100-102 of the Civil law (KUHPerdara) appears to answer the problem of many finding someone who claims to be married but does not have authentic marriage documents in the form of marriage certificate due to lack of legal awareness and the lack of uniformity of rules regarding marriage contained in the civil law (KUHPerdara). However, the Civil code has certain weaknesses, including in cases of ratification of marriage, namely the disparity between the indigenous population, the foreign east and the Chinese, this is what causes the absence of unification of a regulation so that the potential for not fulfilling the intent of article 100 of the Civil code is higher. This is the background for the birth of Law number 1 of 1974 concerning marriage. In the event that the Isbat marriage of the Civil code provides a clear point that the acknowledgement of the validity of a marriage that is not registered or has been registered but cannot show proof of its registration, the assessment of the validity of a marriage is submitted according to the judges' judgement. Delegation of authority by law to judges' assessments of the validity of a marriage is to use the attribution instrument, in which judges can create new powers and expand existing powers. Judges must try to explore the law and even find the law (*recht vinding*). Therefore, the principle of *asas ius curia novit* (*the judge is considered to understand all laws*) must be attached to the judge as the recipient of the attribution authority regarding marriage Isbat. Thus, the Civil Code does not provide a strict limit on the elements that can be considered by the judge in determining the validity of a marriage.

The birth of Marriage Law number 1 of 1974, the old regulations on marriage regulated in the Civil Code (KUHPerdara) are no longer enforced, this is in accordance with the legal principle of *Lex posterior derogat legi priori*, furthermore, this is also stated in Article 66 of the UUP. Legal experts differ in understanding the validity of a marriage, some consider that Article 2 paragraph (1) and (2) apply as a cumulative condition for the validity of a marriage, but other opinions assume that paragraph (1) and (2) do not apply cumulatively so that a marriage is considered valid/legal. As long as it is carried out based on Article (1) while Article (2) is only an administrative requirement to obtain authentic evidence regarding the implementation of the marriage. Both views have legal implications in society and be a driving factor for the high number of unregistered marriages. It also results in the settlement of the marriage application case of Isbat in court. Like the Civil Code, Law number 1 of 1974 as amended by Law number 16 of 2019 regarding amendments to Law number 1 of 1974 also does not provide limitations regarding the marriage event that can be requested for ratification. Even in Law number 1 of 1974 and Government regulation number 9 of 1975 there is no mention of unregistered marriages. Therefore, in Article 47 Jo, Article 48 of Government Regulation number 9 of 1975 still provides an opportunity for all regulations regarding marriage to be enforced as long as they are not regulated in Law number 1 of 1974 and Government Regulation number 9 of 1975.

In contrast to the Civil Code and Law number 1 of 1974 concerning marriage, the Compilation of Islamic Law (KHI) regulates the Isbat of marriage in a strict manner by providing limitations as described in article 7 paragraph (1),(2),(3),dan(4) when a marriage can only be proven by a marriage certificate made by marriage registrar (VAT). If a marriage cannot be proven by a marriage certificate, then the marriage certificate can be submitted to the Religious Court/Syar'iyah Court. The marriage Isbat submitted is limited to five things, namely, the existence of a marriage in the context of the settlement of divorce, the loss of the marriage certificate; there are doubts about the validity of one of the conditions of marriage, the existence of a marriage that occurred before the enactment of Law number 1 of 1974 and marriages carried out by those who do not have

materials barriers according to Law number 1 of 1974. Meanwhile, those who are entitled to apply for Isbat marriage are husband or wife, their children, marriage guardians and parties with an interest in the marriage. Compilation of Islamic Law (KHI) provides an opportunity to submit a marriage certificate to Religious Court/ Syar'iyah Court to obtain a Marriage Certificate as authentic evidence of the existence of a marriage. Where the legal force of the marriage certificate in the same as the legal force of the marriage certificate. Thus, the legal consequences arising from unregistered marriages which are later implied will be the same as registered marriages at the same time marriage was carried out.

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